United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2683

Docket No. 74-2683

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOHN ZITO, individually
and on behalf of all others similarly
situated - Plaintiff

VS.

CASPAR WEINBERGER, individually
and in his capacity as Secretary of
Health, Education & Welfare - Defendant

PLAINTIFF - APPELLANT'S REPLY BRIEF

John M. Boesen
Fairfield County Legal Service
342 Atlantic Street
Stamford, Connecticut 06901
203-348-9216
Attorney for the Plaintiff

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The plaintiff agrees with the defendant's statement that this case is controlled by Sosna v. Iowa U.S. ___, 43 U.S.L.W. 4125 (Jan. 14, 1975) (Brief and Appendix for the Appellee pg. 7). However, the plaintiff strongly disagrees with the defendant's analysis of the reasoning behind the Court's decision.

In Sosna, the Court was faced with a constitutional challenge to Iowa's one year residency requirement for divorces. At the time the Court heard the case, the one year had long since expired for the plaintiff and she had obtained a divorce in another state. The Court's holding is set forth by Judge Rehnquist at pg. 4128,

> We believe that a case such as this, in which as in Dunn, the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs.

It is relevant to note that in the footnote immediately following this quotation, the Court notes that this view prevails in the majority of the Circuits and sets forth a list of decisions including both those which confirm and contradict this statement of the law. Norman v. State Board of Parole 458 F.2d 497 (2d Cir. 1972) is listed as one of the cases

holding to the contrary. It was this case upon which Judge Newman relied in the lower Court in dismissing this action. Norman would clearly appear to have been supplanted by Sosna as the controlling authority on the question of mootness and standing to represent a class.

The Court does mention in Sosna, on the same page, that there must be a named plaintiff with a proper case or controversy at the time the complaint is filed and at the time a class action is certified by the District Court. The defendant seeks to distinguish Sosna from the case at bar on this basis. In the case at bar, a class was never certified by the Court and, in fact, the plaintiff's motion for certification as a class was denied.

However, in footnote 11 of its opinion, the Court said:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot, as to them, before the District Court can reasonably be expected to rule on a certification motion. In such instances whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim, that otherwise the issue would evade review. (emphasis supplied).

As Judge Friendly recently noted, however, what is said in the text is "largely drained" by this footnote. Frost v. Weinberger ___ F.2d ___ (2d Cir. Slip Opinion at pg. 2932 (Apr. 17, 1975).

It is the plaintiff's contention that the facts in the present case which are different from those which were before the Supreme Court in Sosna, do not justify this Court's reaching a different result with respect to mootness or the lack of standing to represent the class. Rather, this case is the type which Justice Rehnquist sought to cover by footnote 11.

The fact that, in the case at bar, the Court denied plaintiff's motion for certification as a class is clearly not a sufficient basis for distinction. The ruling of the lower Court, as its title makes clear, was actually a ruling on defendant's motion to dismiss on the grounds of mootness and lack of standing. At the end of the opinion, the Court denies plaintiff's motion for certification as a class action as a matter of form. Having accepted the defendant's arguments with respect to mootness, this denial was complementary to the Court's granting of the plaintiff's motion to dismiss. Nowhere in its opinion does the Court discuss the requirements of Rule 23 of the Federal Rules of Civil Procedure and whether these requirements are met by the instant case, indeed, such a discussion is precluded by the granting of the defendant's motion to dismiss. In this type of case, the Court's attention must focus on the status of the controversy at the time of the filing of the complaint, since the actions which allegedly mooted this

suit occurred prior to a proper consideration of whether this action was properly brought as a class action.

This is especially so, as the event on which the Court based its finding of mootness was not the passage of time, or some action beyond the control of either party, but was the defendant's decision to waive its claim against the named plaintiff in this action after the commencement of suit. This decision was solely within the power and authority of the defendant and, as such, makes this a case in which there is a clear reality that, if the District Court's decision is upheld, the issue will continue to evade review.

The decision of the Supreme Court in Gerstein v. Pugh ___ U.S. ___, 43 Law. Ed. 2d 54, 63n.11 gives credence to the plaintiff's reading of the import of the Sosna decision. That case was concerned with the right of pretrial detainees to a judicial determination of probable cause for a continued pretrial detention. At footnote 11, the Court noted that the record did not indicate whether the named parties were still in custody at the time the District Court certified the class. The Court went on to state that, regardless of whether they were or not, the case was a suitable exception to that requirement and cited the Sosna footnote as authority, since the Court could not be certain that a prisoner could ever be in pretrial custody for a sufficient amount of time for a judge to certify

the class. In addition, the Court felt certain of the existence of many prisoners who would be harmed by the pretrial custody procedures presently in effect.

The case at bar is analogous in that there is no question of the existence of great numbers of Social Security recipients who are subject to recoupment by the defendant. Also, since the defendant may waive its claim against any named respondent, it is extremely doubtful whether any particular dispute would remain active long enough for a class to be certified by a District judge.

This Court has quite recently had occasion to render decision in a case very similar to this one. In Frost v. Weinberger, supra, this Court heard an appeal concerning the right of survivors' children to a pre-reduction or evidentiary hearing prior to a reduction of their benefits because of claims of illegitimate children. Although the Court reversed that case on the merits (finding that, with respect to the specific fact situation in Frost, Social Security procedures satisfied due process),the Court affirmed the District Court's finding that the action was not moot and that the named plaintiff had standing to litigate the issues on behalf of the class. Relying on Sosna, the Court found that the action was not moot, as Mrs. Frost had commenced her suit as a class action. The Court's opinion discusses Sosna at length and the considerations

voiced by the Court in that opinion support the plaintiff's contention that this case should have not been dismissed as being moot.

The plaintiff asserts that, in light of the Sosna and Frost decisions, Norman v. Connecticut State Board of Parole, 458 F.2d 497 (2d Cir. 1972), can no longer be said to represent the law in this Circuit on mootness. Based upon the authority cited in this and plaintiff's original brief, this Court should reverse the decision of the District Court dismissing this action.

RESPECTFULLY SUBMITTED

John M. Boesen
Attorney for the Plaintiff
FAIRFIELD COUNTY LEGAL SERVICES
342 Atlantic Street
Stamford, Connecticut 06901

This is to certify that a copy of plaintiff's reply brief was mailed postage prepaid to Kenneth R. Davis, Assistant United States Attorney, 915 Lafayette Blvd. Bridgeport, Connecticut.

John M. Boesen